IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 14/2006

Smt. Tulsi Sadanand Desai. ..... Appellant.

Vs.

Smt. Angelina Fernandes. ..... Respondent.

Mr. V.G. P. Dukle, Advocate for the appellant.

Mr. Shambhu Kakodkar, Advocate for the respondent.

CORAM : P.V. KAKADE, J.

DATE : 20th November, 2006.

P.C.

Heard learned Counsel for both the parties. Perused the record. The appellant-plaintiff has preferred this appeal against the Judgment and Order passed by the lower appellate Court, dismissing the appeal and confirming the Judgment and Order passed by the trial Judge on 21.9.04, dismissing the plaintiff's suit.

2. The plaintiff filed the suit alleging that she was lawful owner in possession of the property surveyed under No. 118/25 and situated at

Nagorcem, Palolem Village of Canacona Taluka. In the suit property, there was a hut which consisted of palm leaves and the late father of the plaintiff had allowed the defendant and her late husband on humanitarian ground to erect the suit hut consisted originally of size of about 7 x 5 metres. The plaintiff has sought to make out a case that her late father Ganba B. Dessai expired on 18.9.91 leaving behind him two daughters and one son. Upon death, she has inherited right to the properties, including the suit property left by late Ganba B. Dessai and as such, she sought a relief of permanent injunction, restraining the defendant, her family members, agents, etc. from interfering in any portion of the suit property and requiring the defendant to demolish the structure. Hence the suit came to be filed for perpetual and mandatory injunction, seeking direction to the defendant to hand over the area illegally occupied by the defendant by erecting stone pillars, twelve in number and pulling down the same, thereby restoring the land to its original position. It was also prayed that the defendant also be evicted from the property.

3. The defendant contested the suit, inter alia, denying all the allegations made by the plaintiff, submitting that the plaintiff was not the absolute owner in possession of the suit property. The defendant denied the allegation of the plaintiff that there was a “khomp” and had stated that

it was a residential house of the defendant constructed by her late husband with laterite stone pillars and on such and other grounds, the suit was sought to be dismissed.

4. The learned trial Judge, after hearing both the parties and relying upon available evidence, came to the conclusion that the plaintiff had proved that she was lawful owner of survey No. 118/25 and that the plaintiff failed to prove that the defendant has erected a new hut by the side of the old hut, having an area of 7 x 5 metres. Further, it was held that the plaintiff failed to prove that the defendant had demolished the earlier old hut and erected another hut of larger area. Further it was held that the defendant on her part had proved that the original hut was of the size of 11.30 x 6 metres and that the defendant had undertaken only repairs thereof and on such and other grounds, the suit came to be dismissed.

5. The appeal was carried to the District Court, Margao. The learned lower appellate Judge, after hearing both the parties, came to the conclusion that the plaintiff had failed to prove that her late father had allowed the defendant to erect the hut, as alleged and that in May, 1995, the defendant had extended the suit structure. It was further held that the

defendant had proved that the Civil Court had no jurisdiction to issue declaration to the effect that the order of the Mamlatdar dated 29.9.98 was null and void and as such, the appeal came to be dismissed.

6. At the outset, it may be noted that the only substantial question of law sought to be raised on behalf of the appellant is to the effect that whether the lower Court committed an error in deleting issue No.5(A) and the first appellate Court inspite of finding that the same issue was vital, committed further error to answer the same in the affirmative thereby holding that the plaintiff had not been able to prove that the provisions of the Mundkar Act had not been complied with and that the Joint Mamlatdar had not acted in accordance with the fundamental principles of judicial procedure and that the plaintiff cannot seek the defendant's eviction in Civil Court, ignoring that the said issue was deleted. It was brought to my notice by the learned Counsel for the appellant that by Order dated 7.2.2002, the trial Court deleted issue No.5(A) which was raised earlier. That issue was to the effect that whether the plaintiff had proved that the defendant obtained Order dated 29.9.98 with collusion of the authorities and said to be declared as null and void, ineffective and inoperative in law. The said issue came to be deleted by a speaking order holding that the defendant was already declared as the *munkdar* by

order dated 29.9.98 for an area of 72 sq meres in respect of dwelling house and that the defendant had not sought mundkarship declaration against the present plaintiff and others who were co-owners along with Vasant Ganaba Desai. The said Vasant had no right or authority to act for or on behalf of the plaintiff and her sister and the defendant had to seek mundkarship declaration against the plaintiff and her sister in order to effectively decide the matter in dispute and as such, since they were not parties, the additional issue No.5(A) came to be deleted.

It was further submitted that the lower appellate Court Judge while adjudicating the dispute on merits, made certain observations in para 48 of the impugned order to the effect that issue No.5(A) should not have been deleted and further proceeded to observe that in any case, on going through the evidence on record, the Court found that the plaintiff had not been able to prove that the provision of the Mundkar Act had not been complied with and that the Joint Mamlatdar had not acted in accordance with law. On this basis, it was sought to be submitted that when the trial Court had dealt with the issue, the appellant did not get opportunity to lead evidence in that regard and if that was the position, the lower appellate Court should not have referred to that issue at all by making observations as contained in para 48. However, I am satisfied that even if we totally eliminate from consideration the observations made in para 48,

also still the adjudication cannot be said to be defective in any manner whatsoever, especially in view of the speaking order passed by the trial Court while dealing with the issue and the other discussion on the basis of the evidence on record made by the lower appellate Court.

7. Be that as it may, the fact remains that there is no substantial question of law involved in this appeal and all the issues involved in this appeal are issues of facts and seen to have been adjudicated in proper perspective by both the Courts below and, therefore, would book no interference in this appeal.

8. In the result, the appeal stands dismissed with no order as to costs.

P.V. KAKADE, J.

ssm.